Supreme Court, U.S.
FILED
JUN 23 1984
ALEXANDER L. STEVAS
CLERK

NO. 83-1885

In the Supreme Court of the United States

OCTOBER TERM, 1983

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Petitioner

VERSUS

ROBERT H. SCHULTE

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEVEN B. WITMAN
JOHNSTON & DUPLASS
210 O'KEEFE AVENUE, SUITE 900
NEW ORLEANS, LOUISIANA 70112
(504) 561-8991

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

BEST AVAILABLE COPY

18 pp

QUESTIONS PRESENTED FOR REVIEW

Whether the Louisiana Direct Action Statute, LSA-R.S. 22:655, grants a right of action to a Louisiana resident against a foreign insurer, authorized to do and doing business in Louisiana, within the jurisdiction of the United States District Court for the Eastern District of Louisiana, when the accident occurred in Mississippi with a Mississippi resident who was insured under a policy of automobile liability insurance written and issued in the State of Louisiana?

Whether the application of the Louisiana Direct Action Statute, LSA-R.S. 22:655, against a foreign insurer constitutes a violation of the due process clause of the United States Constitution?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
STATUTES INVOLVED 1
STATEMENT OF THE CASE 2
1. Course of Proceedings and Disposition in the District Court 2
2. Disposition of Appeal 3
3. Statement of the Facts 4
SUMMARY OF ARGUMENT 5
ARGUMENT 7
I. THE LOUISIANA DIRECT ACTION STATUTE, LSA-R.S. 22: 655, GRANTS A RIGHT OF ACTION TO A LOUISIANA RESIDENT AGAINST A FOREIGN INSURER, AUTHORIZED TO DO AND DOING BUSINESS IN LOUISIANA, WITHIN THE JURISDICTION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, WHEN THE ACCIDENT OCCURRED IN MISSISSIPPI WITH A MISSISSIPPI RESIDENT WHO WAS INSURED UNDER A POLICY OF AUTOMOBILE LIABILITY INSURANCE WRITTEN AND ISSUED IN THE STATE OF LOUISIANA 7
II. THE APPLICATION OF THE LOUISIANA DIRECT ACTION STATUTE LSA-R.S. 22:655, AGAINST A FOREIGN INSURER DOES NOT CONSTITUTE A VIOLATION OF THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION 9
CONCLUSION 10
PROOF OF MAILING—AFFIDAVIT 11
PROOF OF SERVICE
CERTIFICATE OF BAR MEMBER 12

TABLE OF AUTHORITIES

CASE **PAGE**

Allstate Insurance Company v. Hague,
449 U.S. 302, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981) 9

Esteve v. Allstate Insurance Company,
351 So.2d 117, 120 (1977) 7

Kirchman v. Mikula,
258 So.2d 701 (La.App. 3rd Cir. 1972) 8

Lumbermen's Mutual Casualty Company v. Elbert,
348 U.S. 48, 75 S.Ct. 151, 99 L.Ed. 59 (1954) 8

Morse v. Hartford Casualty Insurance Company,
301 So.2d 741 (La.App. 3rd Cir. 1974) 9

Signal Oil & Gas Co. v. Barge W-701,
654 F.2d 1164, 1165 (5th Cir. 1981) 7

Sprow v. Hartford Insurance Company,
259 F.2d 412 (5th Cir. 1979) 8

Watson v. Employers Liability Assurance Corp.,
348 U.S. 66, 74, 75 S.Ct. 166, 170-171, 99 L.Ed. 74 (1954) 9

Webb v. Zurich Insurance Company,
251 La. 558, 205 So.2d 398 (1967) 7, 9

Statutes

LSA-R.S. 22:655 . . . . . i, 1, 2, 7, 9

Mississippi Code, Section 83-18-21 1

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY

Petitioner

VERSUS

ROBERT H. SCHULTE

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTES INVOLVED

1. Mississippi Code Section 83-17-21 provides in pertinent part as follows:

> "....This shall be done in order that the State may receive the taxes required by law to be paid on the premiums collected for insurance on all persons and property situation in this State."

2. Louisiana Direct Action Statute, LSA-R.S. 22:655

STATEMENT OF THE CASE

1. Course of Proceedings and Disposition in the District Court.

Respondent Robert H. Schulte filed this action for personal injuries arising out of an automobile accident occuring on August 13, 1980, in the United States District Court for the Eastern District of Louisiana against petitioner State Farm Mutual Automobile Insurance Company, the insurer of Donald L. Smith. Respondent asserted that State Farm was a foreign insurer authorized to do and doing business in the Eastern District of Louisiana and that a right of action existed against State Farm under the Louisiana Direct Action Statute, LSA-R.S. 22:655.

Petitioner State Farm filed a Motion to Dismiss initially contending the Louisiana Direct Action Statute did not grant a right of action to respondent when the accident occurred in Mississippi and where the insurance policy was *issued* in Mississippi. Respondent opposed this Motion to Dismiss on the basis that the policy of insurance was, on the fact of the policy itself, issued in Monroe, Louisiana. The cover sheet of the State Farm Insurance policy issued to Donald L. Smith, exhibit P-1, states as follows: "The address of the Regional Office which issued this policy is shown at the top of the Declarations Continued Page enclosed herein." This "Declaration Continued Page" states that this policy was issued at the State Farm Office in Monroe, Louisiana. The statement of the Mississippi State Farm agent submitted by petitioner in support of its Motion to Dismiss did not assert that the policy was *written, issued* and *delivered* in Mississippi. This Motion to Dismiss was denied by Minute Entry dated January 20, 1982, with written reasons. (R. I., pp. 24-25). The District

Court made a finding of fact that the policy of insurance issued by petitioner State Farm to its insured was issued in the State of Louisiana. Such a finding of fact was sufficient, under the jurisprudence of State and Federal Courts, to confer jurisdiction over petitioner.

Petitioner State Farm then filed a Motion for Reconsideration or for New Trial on April 12, 1982, submitting a new affidavit of its Mississippi agent. The agent contended that the policy was not issued and "complete" until he countersigned the policy after it was issued in Monroe, Louisiana. This assertion and self-serving declaration was not supported by the policy of insurance itself submitted into evidence before the District Court. The State Farm policy declared an effective date when issued in Monroe, Louisiana and prior to the counter-signature of the Mississippi State Farm agent. The Motion for Reconsideration of for New Trial was denied by Minute Entry dated July 30, 1982. (R. I., p. 45).

After an answer to the Complaint was filed by petitioner State Farm, this action came on for Trial before the Honorable Judge Cassibry on June 2, 1983. Judgment was rendered in favor of respondent and against petitioner in the amount of $21,538.50, plus court costs and legal interest from August 12, 1981 until paid. Said Judgment was signed on June 7, 1983 and entered on June 8, 1983. (R. I., p. 98). Petitioner filed a Notice of Appeal from this Judgment.

2. Disposition on Appeal.

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed. In its per curiam opinion, the Court deferred "to the extensive knowledge and experience

of the District Court in Louisiana jurisprudence." The Petition for Rehearing filed by petitioner was denied.

3. Statement of the Facts.

State Farm's insured, Donald L. Smith, was a resident of the City of Jackson, State of Mississippi. Plaintiff was a resident of the Parish of Jefferson, State of Louisiana, and was a passenger in the vehicle which was involved in the accident with Donald L. Smith. This accident occurred on August 13, 1980 in the City of Jackson, State of Mississippi. State Farm is a foreign insurer authorized to do and doing business in the State of Louisiana. The policy issued by State Farm to Donald L. Smith was in full force and effect on the date of this accident. All parties stipulated that the sole cause of this accident was the negligence of Donald L. Smith, that his negligence was the proximate cause of this accident, and that no contributory or comparative negligence could be assessed on the part of plaintiff.

At trial, respondent introduced medical bills and reports along with copies of the depositions of Donald L. Smith and Larry Hurst. All four of the treating physicians and the expert economist were domiciled in New Orleans, Louisiana. All fact witnesses listed in the Pre-Trial Order except for petitioner's insured were also Louisiana domiciliaries. Respondent Robert H. Schulte testified concerning his injuries, medical treatment and damages. The policy of insurance issued by State Farm and the insurance binder were introduced into evidence as P-1 and P-2.

Petitioner State Farm then presented the testimony of Terry Jones, the Service Superintendent for State Farm Mutual Automobile Insurance Company in Monroe,

Louisiana. In about 1969, State Farm chose for economic reasons to locate their office in the State of Louisiana to issue insurance policies for persons living in Louisiana, Mississippi and Arkansas (R. II., p. 27). Furthermore, petitioner State Farm does and is authorized to do busines in the State of Louisiana and obviously derives substantial revenue from issuing policies in Louisiana for its insureds in Louisiana, Mississippi and Arkansas. The State Farm Regional Office in Monroe, Louisiana performs functions much more vital than the mere servicing of policies. Underwriting and pricing decisions are made at the Monroe, Louisiana office which has the power not only to issue the policy, but also to cancel the insurance binder immediately. (R. II., pp. 24, 27-29).

The Application for Insurance bound State Farm with an effective date of March 31, 1980 upon the issuance of the policy by State Farm in Monroe, Louisiana, and not upon the counter-signature of the State Farm agent. The counter-signature of the agent is required by Mississippi Statute so that the State of Mississippi will receive taxes required to be paid on the insurance premiums collected on persons living in Mississippi. Mississippi Code, Section 83-18-21.

Based upon the testimony of the witnesses and the exhibits introduced into evidence, the District Court correctly decided in its Minute Entry of January 20, 1982, and in its Judgment of June 7, 1983, that the State Farm Mutual Automobile Insurance Company policy was issued to Donald L. Smith in the State of Louisiana.

SUMMARY OF ARGUMENT

The issue here is not one of forum-shopping nor the

creation of a greater volume of litigation in the Federal Courts. There is no dispute that diversity does indeed exist among all possible parties in this litigation. Respondent Robert H. Schulte, petitioner State Farm Mutual Automobile Insurance Company, and Donald L. Smith, the insured of State Farm are all diverse. The decisions of the lower Courts would not create any greater volume of litigation in the Federal Courts. Jurisdiction in Federal Courts in the State of Louisiana has already been approved in a suit for personal injury under the Louisiana Direct Action Statute against the insurer alone where diversity of citizenship existed. The State of Louisiana has a constitutional right to subject petitioner to the direct action provisions of its laws whether petitioner consents or not.

The issue is rather one of due process. The Supreme Court of Louisiana has already ruled that Louisiana Direct Action Statute confers jurisdiction over a foreign insurer not only where the policy was written and delivered, but also where the policy was issued in Louisiana. The evidence before the lower Courts and even the testimony of petitioner's service superintendent supports the conclusion that this policy was issued in the State of Louisiana. There is no denial of due process where a foreign insurer is compelled to consent to direct action as a condition of doing business in the State of Louisiana. Furthermore, there is no constitutional bar to asserting jurisdiction over a defendant who does business in this State, even though the cause of action arose in another State, where the insurance policy was issued in Louisiana.

ARGUMENT

I. THE LOUISIANA DIRECT ACTION STATUTE, LSA-R.S. 22:655, GRANTS A RIGHT OF ACTION TO A LOUISIANA RESIDENT AGAINST A FOREIGN INSURER, AUTHORIZED TO DO AND DOING BUSINES IN LOUISIANA, WITHIN THE JURISDICTION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, WHEN THE ACCIDENT OCCURRED IN MISSISSIPPI WITH A MISSISSIPPI RESIDENT WHO WAS INSURED UNDER A POLICY OF AUTOMOBILE LIABILITY INSURANCE WRITTEN AND ISSUED IN THE STATE OF LOUISIANA.

The Louisiana Direct Action Statute has been reviewed on several occasions by the highest State and Federal Courts. The Supreme Court of Louisiana held that jurisdiction is conferred under the Louisiana Direct Action Statute when the policy of insurance was issued or delivered in Louisiana. *Webb v. Zurich Insurance Company,* 251 La. 558, 205 So.2d 398 (1967). This case was cited with approval in *Signal Oil & Gas Co. v. Barge W-701,* 654 F.2d 1164, 1165 (5th Cir. 1981). Following its ruling in *Webb, supra,* the Supreme Court of Louisiana held in *Esteve v. Allstate Insurance Co.,* 351 So.2d 1117, 1120 (1977), that the place of issuance of the insurance policy is controlling where the accident occurs in another State.

Thus, the issue is not one of forum-shopping or the creation of a greater volume of litigation in the Federal Courts. In each of the examples posited by petitioner, federal diversity jurisdiction would still exist and there would be no increase in the volume of Federal Court litigation. The choice

alone to locate a regional office in Louisiana is not the controlling issue, although petitioner obviously believed it was economically beneficial to locate in Monroe, Louisiana. The facts presented to the District Court describing the functions and authority of the State Farm office in Monroe support a conclusion this policy was issued in the State of Louisiana.

The significant issue here is whether the Louisiana Direct Action Satute grants a right of action within the jurisdiction of the United States District Court for the Eastern District of Louisiana under the facts of this particular case. This Honorable Court has already approved federal jurisdiction in a Louisiana Federal District Court in a suit for personal injury and damages under the Louisiana Direct Action Statute against a foreign insurer alone where diversity of citizenship existed. *Lumbermen's Mutual Casualty Company v. Elbert,* 348 U.S. 48, 75 S.Ct. 151, 99 L.Ed. 59 (1954).

Petitioner relies upon cases which are distinguishable from the facts of this case. In *Kirchman v. Mikula,* 258 So.2d 701 (La. App. 3rd Cir. 1972), the GEICO insurance policy was issued to its assured in the State of New Jersey. In *Sprow v. Hartford Insurance Company,* 594 F.2d 412 (5th Cir. 1979), the defendant insurance agency did no business in the State of Louisiana and the Hartford insurance policy was issued in the State of Mississippi.

Thus, the Louisiana Direct Action Statute grants a right of action to respondent against petitioner State Farm within the jurisdiction of the United States District Court for the Eastern District of Louisiana under the facts of this case.

II. THE APPLICATION OF THE LOUISIANA DIRECT ACTION STATUTE LSA-R.S. 22:655, AGAINST A FOREIGN INSURER DOES NOT CONSTITUTE A VIOLATION OF THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

The minimum contacts required to confer jurisdiction under the Louisiana Direct Action Statute can be satisfied in two respects. First, the qualification to do and the doing of business in the State of Louisiana is sufficient to confer jurisdiction. *Morse v. Hartford Casualty Insurance Company*, 301 So.2d 741 (La.App. 3rd Cir. 1974). Secondly, jurisdiction is conferred under the Louisiana Direct Action Statute when the policy of insurance was issued or delivered in Louisiana. *Webb v. Zurich Insurance Company*, 251 La. 558, 205 So.2d 398 (1967).

> "...Louisiana has a constitutional right to subject foreign liability insurance companies to the direct action provisions of its laws whether they consent or not." *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 74, 75 S.Ct. 166, 170-171, 99 L.Ed. 74 (1954).

In *Allstate Insurance Company v. Hague*, 449 U.S. 302, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981), this Honorable Court held there was no violation of the due process clause by the application of a Minnesota "stacking" law against a foreign insurer. In that case the accident occurred in Wisconsin, all parties on the date of the accident were Wisconsin residents and the policy was issued in Wisconsin. On the other hand, the insurer was doing business in Minnesota, the widow petitioner became a Minnesota resident and her deceased husband had worked in Minnesota. Federal jurisdiction in Minnesota was upheld over Allstate Insurance Company.

There is no violation of the due process clause of the United States Constitution where petitioner State Farm does busines and derives substantial revenues in the State of Louisiana, where the State Farm Regional Office in Monroe, Louisiana performs functions of underwriting, pricing, policy production, and policy cancellation in Monroe, Louisiana, where respondent lives and works in Louisiana, where the overwhelming majority of witnesses lived in Louisiana, and there the policy of insurance in question was issued in the State of Louisiana.

CONCLUSION

Petitioner cites no cases which present any conflict between decisions of Federal Courts of Appeals or with the Supreme Court of Louisiana. Nor are there any conflicts cited between decisions of the Supreme Court of Louisiana and other state courts of last resort or of a Federal Court of Appeals. The decisions of the lower Courts in this case do not conflict with the applicable decisions of this Honorable Court.

Jurisdiction is properly conferred over petitioner State Farm in the United States District Court for the Eastern District of Louisiana in this case. The Petition for Writ of Certiorari must be denied.

STEVEN B. WITMAN
JOHNSTON & DUPLASS
210 O'KEEFE AVENUE, SUITE 900
NEW ORLEANS, LOUISIANA 70112
(504) 561-8991
COUNSEL FOR RESPONDENT,
ROBERT H. SCHULTE

PROOF OF MAILING—AFFIDAVIT

I, Steven B. Witman, the attorney for Robert H. Schulte, respondent herein, and whose Application for Admission to the Bar of the United States Supreme Court has been approved, hereby certifies that on the 15th day of June, 1984, I placed with the United States Postal Service, with first class postage, pre-paid and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, the foregoing Opposition to Petition for Writ of Certiorari.

_____

STEVEN B. WITMAN

Subscribed and sworn to before me, at_____, this 15th day of June, 1984.

_____

NOTARY PUBLIC

PROOF OF SERVICE
CERTIFICATE OF BAR MEMBER

I, Steven B. Witman, the attorney for Robert H. Schulte, respondent herein, whose Application for Admission to the Bar of the United States Supreme Court has been approved, hereby certifies that, on the 15th day of June, 1984, I served copies of the foregoing Opposition to Petition for Writ of Certiorari on the parties thereto, as follows:

On State Farm Mutual Automobile Insurance Company, petitioner, by mailing a copy in a duly addressed envelope with first-class postage prepaid, to his attorney of record, as follows:

To Edward P. Lobman
Attorney for Petitioner
2800 Veterans Boulevard, Suite 260
Metairie, Louisiana 70002

STEVEN B. WITMAN
JOHNSTON & DUPLASS
210 O'KEEFE AVENUE, SUITE 900
NEW ORLEANS, LOUISIANA 70112
(504) 561-8991